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No. 87-1746

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE SOUTHLAND CORPORATION, RAY BERRY, TAL COLSON, KEITH JENKINS, ROBERT DUNCAN, JOHN P. THOMPSON, JERE W. THOMPSON, WALTON GRAYSON III, JOSEPH S. HARDIN, R.G. SMITH, EUGENE PENDER, S.R. DOLE, and TERRY DE BARD,
Petitioners,

v.

RICHARD D. and DARLA J. KEATING, MICHAEL M. AND GLORIA G. COY, and HARRY BATTERSBY on behalf of themselves and all other persons similarly situated,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioners,

v.

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COUNTY OF ALAMEDA, CALIFORNIA

I.

INTRODUCTION

Southland's petition for certiorari completely distorts the posture of the case. The California courts have not "acted contrary to this Court's mandate" (Petition, p. 1), nor have respondents "contradicted what they had represented to this Court" (Petition, p. 7), engaged in a "ruse" (Petition, p. 12), or attempted to manipulate the Court's procedures (Petition, p. 9). Briefly stated, this is what happened:

On the first appeal, the parties were asked by the clerk of the state court of appeal what law, state or federal, should govern the issue of whether there can be classwide arbitration. Southland responded that California law applied. Southland did not claim in either that court or in the California Supreme Court that classwide arbitration was barred by the Federal Arbitration Act.

Southland raised that issue for the first time on certiorari to this Court, which refused to hear it on the ground that it had not been raised in or decided by the California courts.[1] The case was remanded "for further proceedings not inconsistent" with this Court's opinion. *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984).

On remand, the superior court refused to reconsider the propriety of class arbitration as a federal issue instead of a state issue, on the grounds that, under California law, Southland raised the argument too late. The decision of the California Supreme Court on the first appeal was now the law of the case. Under California law, that doctrine applies not only to matters actually considered and decided on a prior appeal, but to any matter essential to the decision and in that sense "impliedly" decided. Having deliberately chosen to rely solely on state law on the first appeal, Southland was held barred on remand from recharacterizing the issue as one of federal law. Applying California law as enunciated by the California Supreme Court in its opinion on the first appeal, the superior court ordered classwide arbitration. Southland's appeal from that decision was dismissed because the order, being interlocutory, is nonappealable, and Southland's application for a

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[1] This Court's decision expressly recognized that: . . . . Southland did not contend in the California courts that, and the state courts did not decide whether, state law imposing of class-action procedures was preempted by federal law. When the California Court of Appeal directed Southland to address the question whether state or federal law controlled the class-action issue, Southland responded that *state law* did not permit arbitrations to proceed as class actions, that the Federal Rules of Civil Procedure were inapplicable, and that requiring arbitrations to proceed as class actions 'could well violate the [federal] constitutional guaranty of procedural due process.' Southland did not claim in the Court of Appeal that if state law required class-action procedures, it would conflict with the federal Act and thus violate the Supremacy Clause.

Southland Corp. v. Keating, 465 U.S. 1, 8 (1984).

In the California Supreme Court, Southland likewise argued that California law applied and did not oppose class certification on federal grounds. *Ibid.*

writ was denied. The California Supreme Court declined discretionary review.

In that posture, Southland once again seeks review of the same federal question that this Court refused to hear the first time. It is elementary that in order to maintain jurisdiction in this Court on the ground that a state court has denied a federal right, it is necessary to satisfy the requirements of state procedure for presenting the federal question in a timely and proper fashion. Ordinarily, the federal issue is presented too late in the state courts if it is raised for the first time on appeal. A fortiori, it is too late when raised for the first time on remand to the trial court following appeal.

II

ARGUMENT

A. There Is No Jurisdictional Basis for the United States Supreme Court to Review the Order

Southland's petition for certiorari attempts to present the issue whether California's classwide arbitration procedure is preempted by the Federal Arbitration Act. There are two reasons why that issue may not be considered at this juncture: (1) the California Superior Court did not decide the purported federal issue posed by Southland but based its order upon adequate and independent state grounds, and (2) the order is not final for purposes of United States Supreme Court review.

1. The California Superior Court Did Not Reach The Federal Issue Posed by Southland, But Rested Its Decision Upon Adequate and Independent State Grounds

In its statement of decision issued with its order, the superior court held as follows:

> Southland has argued to this court that the permissibility of class arbitration is governed by the Federal Arbitration Act. The court declines to consider this argument because the doctrines of invited error and law of the case preclude Southland from raising such argument at this point in these

proceedings. This court has therefor determined the propriety of class arbitration under state law.

It is a fundamental rule that this Court will not review state court judgments that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125, 89 L.Ed. 789, 794, 65 S.Ct. 459 (1944); see 12 Moore's Federal Practice, ¶ 511.01, pp. 8-65—8-66 (2d ed. 1982), and cases there cited. In order to maintain jurisdiction on the ground that a state court has denied a federal right, it is necessary to satisfy the requirements of state procedure for presenting the federal question at the right time and in the right way. "[W]hen . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582, 22 L.Ed. 2d 572, 579, 89 S.Ct. 1354 (1969).

Ordinarily the federal issue is presented too late if it is raised for the first time on appeal. *Bailey v. Anderson*, 326 U.S. 203, 205-207, 90 L.Ed. 3, 66 S.Ct. 66, 68 (1945); *Memphis Nat. Gas Co. v. Beeler*, 315 U.S. 649, 650-651, 86 L.Ed. 1090, 62 S.Ct. 857, 859-860 (1942); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 47 L.Ed. 480, 23 S.Ct. 375 (1903); see discussion in Wright, Miller, Cooper & Grossman, Federal Practice and Procedure: Jurisdiction § 4022, pp. 701-703. This is an fortiori case because Southland raised the federal preemption issue in the California courts for the first time on remand *after* the first appeal. At that time it was clearly too late.

An almost identical situation was presented in *Northern Pacific R. Co. v. Ellis*, 144 U.S. 458, 36 L.Ed. 504, 12 S.Ct. 724 (1891). In that case, plaintiff Ellis had sued the railroad in Wisconsin state court to quiet title to a parcel of real estate on the basis that a deed from the county to the railroad was void as an ultra vires gift. The Supreme Court of Wisconsin affirmed a judgment for plaintiff. On remand for further proceedings in the trial court, the railroad sought to rely as a defense upon a recent decision of a federal court on the same issue between the same parties, but affecting a different parcel of land. Relying on federal law, that court had found that a similar deed from the county to the

railroad was valid. *Roberts v. Northern Pacific R. Co.*, 158 U.S. 1, 39 L.Ed. 873 15 S.Ct. 756 (1894). The Wisconsin trial court refused to consider that federal issue, and entered judgment in favor of Ellis. The railroad company again appealed to the Wisconsin Supreme Court, which affirmed on the ground that its prior decision (in which the federal issue had not been raised) was now the law of the case. The railroad petitioned the Supreme Court of the United States for a writ of error. The Supreme Court dismissed the writ. Chief Justice Fuller wrote:

> the decision of the Supreme Court of Wisconsin rested upon an independent ground not involving a federal question and broad enough to maintain the judgment. [Citation.]
>
> The Supreme Court held that by reason of its decision [on the first appeal] . . . , the rights of the parties were *res adjudicata*, and that it was itself, as the parties were, bound by its own former judgment. Its conclusion had been announced and its mandate had gone down, and it had no power upon a second appeal to review that judgment. . . . Under these circumstances the judgment of the [Wisconsin] Supreme Court is not subject to review here.
>
> . . . The judgment before us was rendered in accordance with well settled principles of general law, not involving any Federal question, ...

144 U.S. at 464-465.

The only difference between that situation and the case at hand is that here there was a petition to the United States Supreme Court after the first appeal as well as after the second. In other respects, the posture of the cases appears to be identical. The Supreme Court will not consider a federal issue which the state courts have never considered because of their own application of the doctrine of the law of the case. This limitation on Supreme Court review is clearly applicable here.

2. Southland Is Prohibited by California Law From Changing Its Position From That Taken in the First Appeal

Southland argues that the federal question was properly raised, and that the superior court erred in its application of the law of the case doctrine.[2] This argument is premised upon the assertion that plaintiffs have changed their position from contending, when the case was previously before this Court, that the California courts did *not* decide the federal preemption issue to now contending, under the law of the case doctrine, that it *was* decided. Petition, pp. 11-14. This is a fallacious argument based upon a distortion of what occurred and a misrepresentation of plaintiffs' position.

Plaintiffs have never contended that the California courts in fact decided the federal preemption issue during the first appeal. The California courts clearly did not consider the question for the reason that Southland never raised it and, when asked, advised the California courts that state law prevented classwide arbitration and that the Federal Rules of Civil Procedure did not apply. *Southland Corp. v. Keating, supra,* 465 U.S. at 8; footnote 1, *supra.*

What plaintiffs *have* said is that the California law of the case doctrine applies not only to questions expressly decided on a prior appeal, but to those that were essential to the decision and in that sense "impliedly" decided. See plaintiffs' Reply to Defendant's Opposition to Motion for Class Certification, August 22, 1986, p. 4, citing *Estate of Horman,* 5 Cal. 3d 62, 73, 95 Cal. Rptr. 433, 443, 485 P.2d 735 (1971). There is no inconsistency between the indisputable proposition that the California courts did not decide the federal preemption issue on the first round of appeals (because it was not raised) and the contention that the law of the case doctrine now bars Southland from raising the issue because it was essential to the California Supreme Court's first decision.

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[2] Whether this is so is, of course, a question of state law which has yet to be addressed by the California appellate courts.

The California Supreme Court held on the first appeal that, provided certain criteria were met, arbitration proceedings could be conducted in this case on a classwide basis. *Keating v. Superior Court*, 31 Cal. 3d 584, 613-614 (1982). It was essential to that holding that classwide arbitration was not somehow barred by federal law. The law of the case doctrine under California law applies to matters which were essential to the decision even though not raised. *Gore v. Bingaman*, 20 Cal. 2d 118, 124 P.2d 17 (1942); *Davis v. Edmonds*, 218 Cal. 355, 23 P.2d 289 (1933); *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc.*, 217 Cal. App. 2d 799, 804-805 (1963); see cases collected at 9 Witkin, Cal. Procedure, Appeal, § 754, p. 722 (3d ed. 1985).[3] The superior court therefore was correct in ruling that the doctrine bars Southland from raising a federal preemption issue that it had the opportunity to raise, but did not raise, on the previous appeal.[4]

California unquestionably has a legitimate interest in applying its law of the case doctrine. The doctrine has also generally been followed in the federal courts, where it is thought to serve "the dual pupose of: (1) protecting against the agitation of settled

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[3] Southland's exposition of California law at page 12 of its Petition is superficial. While it is the *general rule* that the law of the case doctrine does not extend to matters which might have been but were not presented and determined on a prior appeal (9 Witkin, Cal. Procedure, Appeal, § 753, p. 721 (3d ed. 1985)), that general rule is subject to an important exception where the particular point was *essential to the decision*. *Id.*, § 754, p. 722. The *Gore*, *Davis* and *Nevcal* cases cited in the text above are cases applying that exception. Southland relies on the general rule without even mentioning the exception, or attempting to distinguish those cases, although plaintiffs have relied upon the exception at each stage of these proceedings.

[4] The superior court in this case based its refusal to consider the federal preemption issue on the doctrines of law of the case and invited error. It was probably also justified on the basis that Southland's conduct in the state court of appeal during the first appeal constituted a waiver of any claim that the Federal Arbitration Act prevented classwide arbitration. See, e.g., *Davis v. Edmonds*, *supra*, 218 Cal. 355, 358, and *Henry v. Mississippi*, 379 U.S. 443, 450, 13 L.Ed. 2d 408, 414, 85 S.Ct. 564 (1965).

issues; and (2) assuring the obedience of inferior courts to decisions of superior courts." 1B Moore's Federal Practice ¶ 0.404[1], pp. 117-120 (2d ed. 1984), and cases there cited. As in the California courts, the federal law of the case doctrine prohibits a party who omits argument on a point of law necessarily involved in the disposition of an appeal from presenting it on a second appeal. *Ibid*, ¶ 0.404[1], p. 120, n. 15. As this Court observed long ago, "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation." *Roberts v. Cooper*, 61 U.S. 467, 15 L.Ed. 969, 973-974, 20 How. 467, 481 (1858).

The same point has been made more recently by a California appellate court in applying the law of the case doctrine:

> Furthermore, it is of no consequence that the point in question was not raised by counsel on the prior appeal or expressly mentioned. [Citations] . . . [I]t becomes immaterial that the lower court upon the first trial did not choose to determine the precise legal issue. The controlling factor here is that the reviewing court did so choose—impliedly at the very least, if not expressly—in order to reach the result which it did.

NevCal Enterprises v. Cal-Neva Lodge, Inc., supra, 217 Cal. App. 2d at 805.

There is thus no inconsistency between plaintiffs' representation to this Court on the first appeal that the California courts did not consider the federal preemption issue and their position that the law of the case doctrine bars Southland from raising it now. After inviting the California courts to treat the class arbitration issue as one of state procedure and then losing on that issue, Southland may not now claim that the issue should have been decided under federal law. It is Southland, not plaintiffs, that has done "a 180 degree turn" (Petition, p. 11) and seeks to "have it both ways (Petition, p. 13)."[5]

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[5] Southland makes several other specious arguments as to why the law of the case doctrine does not apply or is not a bar to review by this Court.

3. The Order Is Not Final for Purposes of United States Supreme Court Review

Under 28 U.S.C. § 1257, this Court has jurisdiction to review only final judgments or decrees rendered by the highest court of a state in which a decision can be had.[6] The finality requirement normally is not satisfied if the state courts still must conduct further substantive proceedings before the parties' rights as to federal issues are resolved, and this Court ordinarily has no jurisdiction to review an interlocutory judgment. *Pennsylvania v.*

First, Southland asserts that the doctrine is merely a "discretionary rule" in California rather than a jurisdictional requirement. Petition, p. 13, n. 11. The California Supreme Court has made it clear, however, that state appellate courts are not free to disregard a prior appellate determination in the case unless it is at least demonstrated that such would result in a "manifest misapplication of existing principles resulting in substantial injustice." *People v. Shuey*, 13 Cal. 3d 835, 846, 120 Cal. Rptr. 83, 533 P.2d 211 (1975). Southland also suggests that the doctrine is not to be applied to "pure questions of law." Petition, p. 13. However, principles of law are exactly what the law of the case doctrine does apply to. *Tally v. Ganahl*, 151 Cal. 418, 421, 90 P. 1049 (1907). See 9 Witkin, Cal. Procedure, Appeal, § 737, pp. 705-706 (3d ed. 1985). Finally, Southland says that the doctrine is inapplicable here because intervening cases have changed or significantly clarified tha law. Petition, p. 13, n. 12. However, the California Supreme Court's decision in this case on the permissibility of classwide arbitration has not been changed or clarified; to the contrary (as Southland itself acknowledges in its Petition), the prior decision has been followed and applied by the California appellate courts. *Izzy v. Mesquite Country Club*, 186 Cal. App. 3d 1309, 231 Cal. Rptr. 315 (1986); *Gainey v. Occidental Land Research*, 186 Cal. App. 3d 1051, 231 Cal. Rptr. 249 (1986); *Lewis v. Prudential-Bache Securities*, 179 Cal. App. 3d 935, 225 Cal. Rptr. 69 (1986).

[6] Contrary to Southland's assertion at page 9 of its Petition, respondents do not contend that the Court lacks jurisdiction merely because the order at issue was entered by a trial court. Rather, respondents contend that this Court lacks jurisdiction because the order was interlocutory, and because the California appellate courts, having declined to review it for that reason, will have an opportunity to do so upon the appeal that Southland will have the right to take from a judgment confirming an arbitration award.

Ritchie, 480 U.S. ____, 94 L.Ed. 2d 40, 51, 108 S.Ct. ____ (1987).

As Southland acknowledges, the court of appeal granted plaintiffs' motion to dismiss Southland's appeal after plaintiffs pointed out that orders directing parties to arbitrate are interlocutory and nonappealable. See 9 Witkin, Cal. Procedure, Appeal, § 71, p. 95 (3d ed. 1985), and cases there cited. Under California law, such orders are reviewable on appeal from a judgment confirming the arbitration award. *Id.*; see Cal. Code Civ. Proc. §§ 1294, 1294.2. On such an appeal, Southland would be entitled to challenge the superior court's application of the law of the case and invited error doctrines and, should it agree with Southland's position on these state law issues, the California Court of Appeal presumably would then consider the federal issue whether classwide arbitration is preempted by federal law.[7] Only such a decision would be final for purposes of 28 U.S.C. § 1257. This Court lacks jurisdiction—not because the state appellate courts declined to review the order at this juncture—but because under state procedure Southland has a remaining appeal as of right.[8]

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[7] California Code of Civil Procedure, section 1294.2—which governs appeals from judgments confirming arbitration awards—provides in part: "Upon an appeal from any order or judgment under this title, the court may review the decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party."

[8] The cases cited by Southland at page 10 of its Petition are not inconsistent with this proposition. In *Perry v. Thomas*, 107 S.Ct. 2520, 96 L.Ed. 2d 426 (1987), this Court reviewed a California Court of Appeal's decision affirming a superior court order *denying* a petition to compel arbitration. Unlike orders directing parties to arbitrate, orders denying petitions to compel arbitration *are* appealable in California. 9 Witkin, Cal. Procedure, Appeal, § 72, p. 96 (3d ed. 1985), and authorities there cited. Thus, once the California Supreme Court denied discretionary review, the court of appeal's decision in *Perry* was the decision of the highest state court in which a decision could be had. There is no indication in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), that the petitioner had a remaining appeal as of right to the state courts.

Southland to the contrary, this case does not come within the exception described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, at pages 482-485, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975).[9] That exception applies to situations in which a state court has written an opinion denying a federal right or claim, which opinion would otherwise remain on the books as precedent unless immediately reviewed by the United States Supreme Court, thus eroding federal policy. *Id.* at 485. There is no such decision here. The California courts have decided a procedural issue—the propriety of classwide arbitration—under state law. The California courts have not addressed the contention that the Federal Arbitration Act prohibits classwide arbitration. That contention has not been considered because under state law Southland is estopped to raise it. There is no precedent on the merits of the issue which could "erode federal policy" and thus no basis for an exception to the general rule that interlocutory judgments are not reviewable by this Court.

B. The Question Does Not Merit Review by This Court

The California courts have not addressed the federal question which Southland seeks to raise. Accordingly, this case does not present any federal question at all. But even if the issue Southland seeks to raise were present, it would not be a substantial issue. Southland's argument—that classwide arbitration is strictly prohibited by the Federal Arbitration Act—is not based on any language in that Act nor upon any federal case that has considered the point. Rather, it is a variant of the same argument that Southland has made all along, namely, that there is something

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Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), involved a prior restraint on free speech, and first amendment rights would have been irretrievably lost if the court had declined to review the ruling of the highest Illinois court on the temporary injunction.

[9] The *Cox* case describes four categories of cases in which the Supreme Court will review state court decisions on federal questions even though further state court proceedings are pending. None of the four is applicable here because each is predicated on there having been a final determination of the federal issue by the state court. 420 U.S. 469, 477. That initial predicate is lacking here because the California courts in this case have thus far declined to decide the federal issue.

fundamentally inconsistent between class action procedure and arbitration, that like fire and water, they cannot coexist. The California Supreme Court rejected that argument when it was presented as a question of state law on the first appeal. *Keating v. Southland Corp.*, 31 Cal.3d 584 (1982). The argument is no more persuasive when premised on the Federal Arbitration Act than on California law. The California statute and policy is as pro-arbitration as is the federal statute and policy.[10]

There is no basis for this Court to declare that class action procedure and arbitration are inherently irreconcilable in their goals or implementation. Class actions are considered important by both the federal and California courts.[11] Class actions serve an important function in our system of civil justice by allowing vindication of small claims which might otherwise go unprosecuted because the result would be consumed by the cost. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). Class actions involving such claims are of special concern to state courts since only those individual claims exceeding $10,000 are within federal diversity jurisdiction. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

Southland's interpretation of the Federal Arbitration Act would eliminate the class action device as a procedure for resolving claims encompassed within standardized contracts containing an arbitration clause. This would have far reaching effects. Any corporation in interstate commerce could insulate itself from liability for classwide wrongs simply by including an arbitration clause in all of its contract forms. We do not believe that the

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[10] The California statute is set forth at California Code of Civil Procedure, sections 1280 et. seq. See also *Morris v. Zuckerman*, 257 Cal. App. 2d 91, 95 (1967) [The arbitration statute "reflects [s] the strong legislative policy favoring arbitration"]; *Sanserino v. Shamberger*, 245 Cal. App. 2d 630, 635 ["Since arbitration is favored . . . every intendment will be indulged to give effect to such proceedings"].

[11] *Gen. Tel. of Southwest v. Falcon*, 457 U.S. 147, 72 L.Ed. 2d 740, 102 S.Ct. 2364 (1982); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551 (1974); *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 469, 174 Cal. Rptr. 515, 629, P.2d 23, 27 (1981).

Federal Arbitration Act was ever intended to be used by parties of superior bargaining power to achieve such an unjust result. There is nothing in the nature or purpose of the Act to prevent a state, in managing its own dockets and procedures, from neutralizing such an unfair tactic.

CONCLUSION

For the reasons stated above, Southland's Petition should be denied.

Respectfully submitted,

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